First Nations Consultation: A First Person Perspective

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> *"…the goal of an emancipatory (social) science calls for us to abandon sterile word-games and concentrate on the business in hand, which is how to develop the most reliable and democratic ways of knowing, both in order to bridge the gap between ourselves and others, and to ensure that those who intervene in other people's lives do so with the most benefit and the least harm."*
>
> Ann Oakley[1]

Preamble

When I was invited to make a presentation for an audience of non-archaeologists I wondered what I could say that would be of use. What could I, as an archaeologist, offer to lawyers, planners and developers with respect to Consultation with First Nations? Then I realized that perhaps what was wanted was a perspective that was outside of, but nonetheless related to, the practice of Consultation with regard to development in Ontario. What follows then, is a personal perspective based on my experiences dealing with First Nations Band Councils, organizations, and individuals. In this paper I am going to speak from my experience as an archaeologist and how the development of a consultation process with First Nations people will affect that discipline. Some of the issues of which I will be speaking are limited in application to the conduct of archaeological research in Ontario but most will be readily transferable to any field of inquiry or endeavour which will become associated with First Nations consultation. Rather than specifically deal with the law, planning or development, I will rely on practitioners within those fields to extract from this presentation what they find useful.

Those who wish to become more familiar with the law surrounding the duty to consult and how this has evolved in recent years may wish to consult John Rowinski's article,

[1] Oakley, Ann. Experiments in Knowing: Gender and Method in the Social Sciences. New York: The New Press, 2000, p. 3.

"Municipal Consultation with First Nations: Evolving Law and Prudent Policy."[2] In this paper delivered before the Ontario Bar Association's 2008 Institute of Continuing Legal Education, Mr. Rowinski provides a summary of the growth of law in this area as it pertains to municipal law and development. His paper provides an overview and summary of key court cases and rulings that have played a major role in defining the duty to consult up to now. What has yet to be resolved, and where the debate is currently focused is over the role that municipalities and business proponents have to play. It is likely that this debate will not achieve any resolution until a number of additional court cases are heard. I expect that we will see a number of these played out here in Ontario within the next few years.

Beginning in the late autumn of 1999, the archaeological consulting community of Ontario has been engaged in a process of redefining the conduct and practices of its industry. This process has included an investigation of the management of the industry by the Ministry of Culture undertaken by the Red Tape Secretariat, followed by an Internal Audit of the Ministry of Culture. One result of these investigations was the establishment of the Customer Service Project which was designed to engage the community of consulting archaeologists in a process of redefining the management and conduct of the industry with the aim of ensuring transparent and equitable practices for all stakeholders. As part of the Customer Service Project, the Technical Advisory Group was established. The Technical Advisory Group was a smaller working group of consultants, academics, agency and Ministry of Culture archaeologists tasked with developing a detailed document of new standards and guidelines that would govern the practices of the industry. I was a participant in every stage of this process from the initial evidentiary submission to the Red Tape Secretariat up to and including the final meetings of the TAG and the Customer Service Project.

Following all of this work over these many years, I would have to say that the overriding impression I have, both for myself and from what I have heard from many members of the consulting community, is that the stated aims of this work have not been met and that nobody is satisfied with the resulting Standards and Guidelines. In large measure, this dissatisfaction stems from how this project of revamping this industry was managed from the outset. Opinions and written submissions were solicited from all members of the consulting community and many people invested considerable amounts of time in crafting what they each felt were key points that must be addressed in any proposed reconsideration of how we conduct our work. However, the data that was collected was never openly discussed, nor were these points debated until after the draft of the proposed Standards and Guidelines were written. Whether the feedback from the community as a whole, or from the members of the TAG, had any real impact in how the final document was determined, we do not know. We do not know how the input was weighted or how it was determined what ideas would be adopted and which were not. Even if this process was nearly flawless in its operation, the lack of disclosure on how these decisions were

[2] Rowinski, John. *"Municpal Consultation with First Nations: Evolving Law and Prudent Policy."* Paper Presented at the 2008 OBA Institute of Continuing Education: Navigating a Rapidly Changing Municipal and Planning Law Landscape (Municipal I). Toronto: Metro Toronto Convention Centre, Feb. 4, 2008.

made, and the limited community debate that was permitted has left a bad taste in the mouths of many, perhaps most, of the archaeologists that participated in the process.

The manner in which Part 6 entitled, "Aboriginal Engagement" was developed has led many to suspect that much the same approach was taken with the entire document and that the feedback sessions and requests for written submissions was to leave the impression of consultation where there was none, or rather none of consequence. This suspicion may be without merit, but it is not without cause. I offer this preamble as a caution to this process. We cannot afford to replicate the mistakes made in that process here. As a result, I do not feel that I can, as one voice, offer my personal impressions of what properly constitutes best practices. I do not have the information or personal background needed to speak for everyone. I cannot speak for the archaeologists, nor the many cultures, nations and bands that make up the group we collectively term First Nations. What I propose instead, is to offer propositions on how I think we can develop practices in a good way that will hopefully satisfy everyone involved that even if we cannot say today what would constitute best practices, we will at least be able to work toward the evolution of these ideas. In reality, it is doubtful that we will ever have a final document in this regard, and I believe the effort and the journey toward that end will produce greater returns for all than anything we might say on the subject at a specific moment in time.

Given the number of interests and cultures involved, it is unlikely that one way or one solution will work for all. The "one size fits all" philosophy that seems to guide the actions of bureaucracies seems unlikely to succeed. Although there is a great deal of discussion on this issue in certain quarters and by certain parties, we have initiated discussion on the problem of consultation without the presence of those for whom the process is meant. So, we have today a situation where bureaucrats, archaeologists, planners, lawyers and developers are developing ways and means of consulting First Nations without ever troubling ourselves to ask the most qualified persons how it is they wish to be included. We should not be surprised to find that once the experts are done designing this process that it fails to deliver the promised results when people with their own intentions and objectives are added to the formula.

Personal Experience and Personal Perspectives

Before I proceed, it might be helpful to give some brief indication of how I came to be involved in these matters. My working relationship with First Nations people began very early in my career. In 1987 I was part of an archaeological research team that conducted work at Sainte Marie-among-the-Hurons. A number of Ojibwa people were employed at this popular tourist attraction as interpreters. The nature of our work on a heritage site of interest to people of a number of cultures and traditions placed me in a situation where innumerable discussions around the interpretation of the past and its implications to people today was a natural by-product of our work. As my career progressed, I had the good fortune to work alongside a number of First Nations individuals who were drawn to the practice of archaeology as a natural extension of their interest in their history. In 1994 I was privileged to be sent to Cat Lake in northwestern Ontario to work with that

community in an effort to document the archaeological resources within their community but also to record the oral history of these people through interviews with community elders. Over the past several years the pace of development combined with the rising interest of First Nations people in the preservation of the sites and material remains of their forebears has meant that many archaeologists have had an ongoing and developing dialogue with First Nations individuals, organizations and communities.

This has resulted in a great deal of interaction with two groups in particular that have been involved in a number of development projects: the Huron or Wyandot or Wendat (historically derived names that essentially apply to the descendants of a confederacy of Nations once resident in Ontario) and the Six Nations of the Grand (popularly known as the Iroquois). I have worked with the Band Councils and the traditional Confederacies of both groups. This includes work as part of a committee convened by the Council and Confederacy of the Six Nations of the Grand that was established to develop heritage policies and protocols to be used on projects affecting the interests of the Six Nations. Most recently, I was required to provide expert testimony before the Ontario Municipal Board regarding the proposed Big Bay Point Resort Community. In this case, the hearing itself was contested by the Huron-Wendat Nation of Wendake, Quebec on the basis that consultation with them had not occurred.

There seems to be a general perception, even amongst lawyers with whom I have spoken, that the conduct of Consultation with First Nations means that one has to negotiate a settlement with a legally defined governing authority. This is typically understood to mean a band council that is recognized under the Indian Act. This means that one should be meeting with representatives of the Band Councils of the communities involved and that what should properly emerge as a result of this dialog is a mutually binding agreement on what will be done and how this will be accomplished. I don't agree. Consultation is not Negotiation. In my view, Consultation suggests that input be sought from the First Nations on their views regarding any proposed undertaking which may affect their interests. The expressed interests and desires of the First Nations must then be incorporated or addressed as much as possible within the proposed project design. Where this is not possible there must be documentation to show how and why these interests and expressed desires could not be addressed. There is no Treaty and not necessarily any settlement of the issues at the end of a Consultation process.

From my lay person's perspective, the requirement to consult really needs to be understood as an extension or expansion of what is typically done with regard to public notice and stakeholder input. The requirement to consult is meant to ensure that the interests of the First Nations are acknowledged, understood and addressed. And this is where we discover that a strict adherence to, or a narrow reading of the law will likely only bring you more grief. So, while opening a channel of communication with the legally recognized Band Council may satisfy the legal requirement to consult and may be recognized as such by certain courts and government agencies, it will be far removed from the intent of the requirement to consult. To understand why his would be so, we have to talk a bit about the history of First nations relations with the Crown.

The important thing to understand is that the Band Councils that we have today within reserve communities are equivalent in most respects to municipal governments. Their organization and their authority are derived from the Indian Act. It is an imposed structure of reserve government that is not recognized by many people within these communities. The First Nations were allies of the French or British Crowns during the colonial period. The land surrenders that were concluded in the 18th and 19th centuries were the result of negotiations between Crown representatives and representatives of the Bands and Nations that had traditionally occupied these territories. At no time did many of these people feel that they had surrendered their sovereignty or that they subordinated their governments to that of the Crown. In the view of many First Nations then, and with much support and sympathy within the international community, the imposition of the Band Councils as mandated under the Indian Act, was an illegal imposition of the interests of Canada over independent peoples. In fact, the traditional beliefs, practices and government of Canada's First Nations were criminalized by the Canadian government in 1928.

As a result, there exists today, a dual government system on many, if not most, reserves. One is the Band Council recognized by the Crown and the other is the traditional government or council that is supported by some numbers of the community but not recognized by the government or the courts. To complicate the matter further, there are large numbers of First Nations people who are not resident on reserves, who are not part of the Bands or recognized by them, but who nevertheless have a self-evident interest in matters that affect people of First Nations ancestry. In my area of work that deals with heritage issues and the disposition of the physical evidence and remains of the history of human occupation in the province of Ontario, there is legitimate interest that cannot be defined by Treaty boundaries or Band membership. It is defined by blood descent and by ethnicity and by alliances and definitions of community that pre-exist the arrival of any Europeans on this continent. These relationships were then reordered and redefined by the injection of European powers into the social and political fabric of this continent. The past did not conform to the present arbitrary and politically expedient geographical divisions. There are many issues when we are dealing with the past that can easily have an impact on the interests of the First Nations people.

The specific bands or nations who would seem to have an interest in any given situation depends upon the moment of time selected to form the basis of interpreting relationships among the various parties and from what perspective this historical snapshot is viewed. The peoples and cultures involved were never rigidly defined. Their locations and boundaries of their territories changed over time, as did the number of people, the ethnic composition, their technology and modes of life. Therefore, to speak of traditional territory implies a selective ordering of the past, the imposition of a rigid geopolitical scheme that was largely absent. But we have imposed this order on Europe as well. Most people are not aware that most of the "Old Countries" are in fact, at least as organized states popularly known today, are quite new; many younger than Canada. Consider that defining the precise ethnic composition of Canada would be immediately limited in its accuracy to the date of the data used, how the data was collected and the manner in which it was synthesized. All of which have built in flaws inherent in these

methods. This form of analysis is further complicated by definitions of ethnicity and who imposes the definition.

Under the Indian Act, the federal government defines who can and who cannot claim status as an Indian. This is a most peculiar and absurd arrangement. Establishing a blood quotient as a means of measuring eligibility in these Nations is not how Nations have traditionally defined themselves, whether you are considering European or Aboriginal Nations. We reserve the right to select people we will include as citizens of Canada from among those who wish to become Canadians. Historically, the First Nations operated much the same way. Historically, like Canada and most other nation states today, you were automatically a citizen if you were born within that Nation. Historically, as now, membership implies expected patterns of behavior and conformity to the laws, duties and obligations that citizenship implies. Also, then as now, punishments within the community or exile from it were methods employed by the Nation to deal with those who failed to meet the requirements of its members.

The people of Wendake, Quebec are descendants of the Huron Confederacy that once occupied the southern Georgian Bay area. Obviously then, they would have an interest in projects which might have an impact on ancestral sites such as ossuaries or villages that were once occupied by their ancestors. However, the people of Wendake are not the only descendants. There are three other communities today that have claims of equal legitimacy as descendant band communities. Among these is the Anderdon Wyandot Nation of Michigan. These people formerly had reserve lands along the Detroit River in Ontario. The Crown took these lands from them during the 18th and 19th centuries. They were the last independent Huron Nation to reside in Ontario. If we look at the treaties surrendering lands west of London, Ontario, we will find that this Nation was one of the signatory First Nations groups. They are the only Huron descent group with land claims filed in the province of Ontario. And yet, because Wendake is the only Huron descent group with a recognized band council within the geographic limits of Canada, it is asserted by some that only they have any legal basis to assert any rights over Huron heritage matters. Wendake, by contrast, has no land claims or treaty rights within the province of Ontario.

Adding to the complexity of this matter, there are yet other Huron descendants resident in Ontario. It is estimated that approximately 300 are members of the Six Nations of the Grand. Their ancestors had joined this other Iroquois confederacy when the Huron Confederacy disbanded in 1649. Do they not also have an interest, and therefore a right to speak, on matters that affect their ancestral sites? What of the number of Wendat descendants who are not part of any of these formally constituted communities? Many Huron descendants have moved back to their traditional homeland to be near their ancestral sites to watch over and protect them. Have these people not demonstrated, perhaps more so than the above-noted communities, their personal interest and commitment to issues that affect their heritage? If then, one chooses to speak only with the band council of Wendake, it is likely to earn the enmity of all these other groups, many of whom have been much more active in taking measures to safeguard heritage sites.

There are yet other factors which further complicate this situation. The geographic areas of historical occupation of the Huron were previously occupied by other First Nations groups and following their departure were occupied anew by yet other First Nations. Who then has an interest when it comes to matters of heritage and ancestral sites? In my own view, the current occupants with Treaty or Aboriginal rights as defined under the Constitution Act have an interest to the extent that, at a minimum, traditional protocol between nations demands that they be informed of the interest of the historically related groups and that any such groups wishing to assert an interest over their ancestral sites must at least have consent of the current occupants to do so. The implied understanding then, is that the resident Nations do not surrender their legitimate claims to territory or rights by allowing the exercise of interests on the part of other First Nations with respect to ancestral sites. I think a clear distinction can and must be made with respect to heritage versus territory, hunting and fishing rights, or other cultural activities associated with existing occupations. In this way it is hoped that emerging conflicts between Nations or interested parties can be avoided.

Another recent complication adding to the complexity of consultation is the emergence of individuals proffering claims to represent numbers of First Nations and Bands. Perhaps more than any other factor, this trend coupled with a willingness on the part of other parties to utilize this easy way out, has the potential to engender serious long-term conflicts amongst all parties involved in the consultative process. In my view the use of self-appointed intermediaries claiming to represent a number of First Nations communities and groups will almost inevitably lead to more unnecessary conflict. Almost any First Nations community with whom I have dealt, whether band council or traditional confederacy, is quite protective of their autonomy and reserve absolutely unto themselves the right to make their own decisions. Anyone purporting to speak for any community or organization ought to be able to demonstrate the fact with appropriate letters of introduction or through a Band Council Resolution. My advice would be that anyone entering into a consultative process establish direct personal contact with representatives from each band, traditional council, and organization involved. Be wary of anyone who is willing to make autonomous decisions. It is nearly a universal practice for both band councils and traditional groups that their representatives have no decision making authority; they act only as vehicles of communication relaying the content of consultation meetings to the people they represent and then delivering the decisions of these people with supporting documentation to the consultation meetings. Using simple solutions to complex problems will not produce viable results and will likely only lead to bigger problems.

The distinction between the traditional and band council people is perhaps the most important amongst a myriad of divisions that currently exist within First Nations communities. This division is not strictly political in nature. This is important to understand because building bridges between these two groups is not merely a question of finding a compromise solution to a particular problem. The division is based on systems of belief and world views that are seemingly incompatible. At the root of this division is how the world and our relationship to it are defined.

> *"At times I feel as if I am spread out over the landscape and inside things, and am myself living in every tree, in the plashing of the waves, in the clouds and the animals that come and go, in the procession of the seasons."*
>
> Carl Jung[3]

So, while the band council and its supporters may appear progressive and willing to participate within the mainstream of Canadian society, to the traditional people, the manner of living of the dominant society is contrary to the their core beliefs.

George Sioui is an academic researcher who is also of Wendat descent. His book entitled, Huron-Wendat: The Heritage of the Circle is an excellent resource for understanding the history and culture of the people descended from the Huron Confederacy. The traditional world view of these people and the conflict of this philosophy with mainstream society are well summarized in the Preface of his book:

> *"For human beings there is really only one way of looking at life on this earth, and that is as a sacred circle of relationships among all beings, whatever their form, among all species. The great danger we face is that of reaching a point where we no longer see life as a vast system of kinship. Strictly speaking, there are no peoples, races, or civilizations: there is only the human species, one among many species of beings. Indeed, this species is particularly weak and dependent on other species and their constituent families – animal, vegetable and mineral; material and immaterial. Furthermore, there is only one civilization appropriate to human existence: the civilization of the Circle, the Sacred Circle of Life. Human societies are of just two kinds: those that recognize and live in kinship with the Circle, and those that have forgotten the Circle.*
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> *"Human societies that think and believe life functions in a linear mode have forgotten that life is a great and sacred circle of relationships. According to linear thought, life is a dependent variable of progress. This progress takes place in a very precise direction, symbolized thus: ⇨. In this view of life, nothing is sacred any longer: everything is secular and must generate 'progress.' The only beings who are still scared in themselves and who can determine what is to be held sacred are those whose strength and ingenuity have enabled them to take control of the process of progress. Such people have, or have had, 'religions' that provide a sacred endorsement of their human institutions as expressing the will of a unique God, a God who has given them the power and made it their duty to dominate and organize his Creation in accordance with their (sacred) interests.*
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> *"This linear view of life inevitably crushes it. Linear-thinking societies destroy circular life and thought within their communities and outside them. These societies compromise their own existence and must therefore leave their places of origin, seeking other locales where life is still sacred and therefore abundant in order to transplant their ;civilization' and thus continue to exist. Clearly, then,*

[3] Jung, Carl. Memories, Dreams, Reflections. New York: Vintage Books, 1961, pp. 225-226.

> *when linear-thinking societies make their appearance in circular-thinking communities, the latter always suffer major or even complete devastation."*
> Georges Sioui[4]

Recently, with the completion of the final draft of the proposed new Standards and Technical Guidelines for Consultant Archaeologists in August of 2006 by the Ontario Ministry of Culture, similar sentiments were expressed in a letter prepared by Michel Gros Louis and read before an audience of consultant archaeologists and Ministry of Culture staff in September of 2006. Michel Gros Louis is a traditional Wendat resident in Wendake, Quebec. He is uniquely positioned to comment on how archaeological sites are managed in the province of Ontario as he is also an anthropologist with expertise in linguistics and archaeology. The comments he made in this letter were endorsed by members of the Six Nations and various Ojibwa communities who were also present at this meeting. They felt Michel Gros Louis had expressed exactly what they wished to have understood by the government and the archaeologists. The importance of archaeological and burial sites to the Wendat in particular, and for First Nations in Ontario in general is made clear in the following excerpts:

> *"As a community and as individuals, the people known to you as the Huron or Wendat or Wyandot have direct historical, emotional, and spiritual connections to the area now defined as the province of Ontario. This land contains ancestral sites where our people resided, hunted, grew crops, performed sacred ceremonies and where a great many were ultimately buried.*
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> *"I commend you and those who have participated in this process thus far in your efforts to make archaeology as it is practiced in this province a more meaningful and standardized practice. We acknowledge and are grateful for the hard work that has been invested by many in this process thus far. However, there remain some difficulties with the document. Given the very limited notice I have had for consultation, I shall restrict my remarks to a very few general remarks. It is regrettable that I have not had the opportunity to go through the document in detail.*
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> *"I am concerned that although the text of this document does say that it is preferable to preserve archaeological sites and that excavation of sites must be justified, there seems to be no mechanism in place to accomplish the stated intent. If we are to believe that the Ontario government is serious about site preservation, it should be a matter of policy that sites will be preserved and protected unless there is a compelling reason to excavate them. Many significant sites across this province have been known for more than one hundred years. Why are these sites not protected and registered on title of those properties in which they are situated? Since many sites have been known for so long, one must conclude that they are only lacking protection because nobody cares enough to protect them. How long does this government have to know about sites before they will act? The lack of*

[4] Sioui, Georges. Huron-Wendat: The Heritage of the Cicle. Vancouver: University of British Columbia Press, 1999, pp. xi-xii.

any measure to protect these sites for the past 100 years has done enough damage to our ancestors and to the memory of our various Nations. This is unnecessary, especially when we are speaking of known sites. Documentation of known sites should be provided to the local planning authority and these sites should be restricted from any proposed use that would disturb them within the Official Plans prepared by the local planning authority.

"The assessment process should be revised so that recently discovered sites are removed from the inventory of developable lands. If this is not possible and sites continue to be excavated on the basis of profit, the rules should be changed to discourage this choice. Currently, many sites are topsoil stripped as a cost effective method to uncover undisturbed cultural contexts. To be blunt, we are offended by the use of heavy equipment on our ancestral sites. If people are determined to remove any site or portion of a site from the landscape for the purpose of development, they should be required to block excavate any area of the site they want to address by excavation. The use of any soil excavated from these sites should be a matter of negotiation with the descendants of the people who lived there.

"Ancestral sites of any kind are sacred to us. To traditional people, everything in nature is sacred and all land and water are sacred sites. Since we are speaking today only of archaeological sites, I will speak of their additional importance apart from being part of creation. There are many reasons why our ancestral homes are important to protect. People need to understand that a location that meets the needs of the people and which will offer sustenance and shelter to them is a gift from the creator. Just as habitat was made for the loon, the hawk, the beaver, and the deer; so too did the creator ensure that there were places where the people could live and prosper. Such places ought to be shown respect. They should be commemorated and celebrated. We have survived to this point because the creator has provided for the people.

"In general, archaeologists mistakenly presume that it is the artifacts and the features of a site that are important. There is much more to these sites of importance. The essence of the ancestors is present on these sites. When you make an arrowhead there is a communion of spirit between the rock and the maker. The objects left behind are not inert and inanimate; they have a spiritual life. This is also true of the land on which the people lived. The digging of pits, erection of posts, lighting of fires and any other activity that occurred there, invested the land with some of the spiritual essence of our people. The soil contains their sweat, their blood, hairs that have fallen from their heads and the decomposed matter of the dead. Even when bones are not found on these sites, we assume that our people were buried there, even if only temporarily before the Feast of the Dead. Our ancestors are present at these places.

"When we allow sites to be dug, and the dirt is casually discarded or trucked away to be used for the lawns of a subdivision, this represents an affront and an

indignity committed against our ancestors. It is also disrespectful to the other spirits resident at these places and in the materials not collected by the archaeologists. We are also concerned that when heavy equipment is used to strip these sites that shallow graves not found during test excavations are being removed. For these reasons, we regard any village as a possible sacred cemetery.

"With these considerations in mind, we must preserve and protect as many sites as we can. We should only be speaking of excavation when there is no other option. Any new policy, regulation, or revision to legislation should reflect sensitivity to the ancestors who created these sacred spaces on the landscape and to the descendant First Nations people living today.

"When burial sites or human remains are found within the province of Ontario, the Cemeteries Act requires that one or more representatives for the deceased be appointed to make a decision regarding the final disposition of the remains. Section 1, Sub-section B of Ontario Regulation 133/92 states:

'In the case of an unapproved aboriginal peoples' cemetery, the nearest First Nations Government or other community of aboriginal people which is willing to act as a representative **AND** whose members have a close cultural affinity to the interred person.' (emphasis added)

"This definition requires that not only must the First Nations be contacted, but also that the people contacted be related to the deceased.

"This is not what is currently happening, the Registrar of the Cemeteries Regulation Section is appointing people who live nearby burial sites to act as the representatives for the deceased. This is not only contrary to the existing law, it is immoral and unethical. It is unfortunate to note that in your document you are merely following what is now being practiced and have chosen to break your own rules. You have failed to take this opportunity to redress some recent wrongs and to ensure that we are following a good and appropriate path of action for the future.

"If one reads the entire Cemeteries Act and the supporting regulations, the intention and the spirit of the law is clearly to have the relatives of the ancestors determine appropriate steps after a burial is found. The current practice makes it impossible for people to assume their proper responsibilities as caretakers of the resting places of their ancestors. People need to understand that the Wendat and most First Nations peoples believe that our relationships do not end as people die. There is a contract between the living and the dead. The ancestors assist the living with their spiritual lives and in return we must honour our ancestors and protect their resting places. This is a sacred trust and an obligation. So, while it is true that the Wendat traditionally included many friends and allies within our burial sites, it was the choice of these people to be buried alongside us. They chose to continue their friendship with our ancestors even after death. This only

> *makes our responsibility to care for these sites that much greater. When we are denied the right to protect these sites we are being denied the ability to fulfill a sacred commitment to our ancestors and to those of our friends who entrusted their remains to our care.*
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> *"People need to be aware that we believe that people have two souls; one will leave the body at death to journey to the village of the dead and the other will remain with the body. To disturb or to excavate the dead is not merely disrespectful of our ancestors' wishes to be buried at a specific location, it is also the most serious of spiritual sacrileges you could commit. Even when a burial site is found to be empty of remains, it is still sacred ground. It has been infused with the spirits of those who were buried there. Just as the physical remains of a person decomposes and becomes part of the soil, so too does the soul become part of that land that has remained with the body. These places will remain sacred to us forever, no matter what their condition. These same considerations should be applied to all archaeological sites."*
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> Michel Gros Louis[5]

The concepts explained above by Michel Gros Louis have been raised time-and-time again by individuals from many different cultures, nations and communities. Indeed, these principles have been expounded by traditional and council supporters alike. It should be noted that the distinction between the traditional and band supporters is, like many generalizations, a false dichotomy: For, while this distinction may be evident and pronounced in some communities, in other locales it seems that the traditional and band faction are one and the same. Every community and situation is unique and has developed through the unique history of the culture, nation and band. There is no common solution to the problem of consultation.

It is important that any consultation process include efforts to communicate with the traditional elements of First Nations peoples. One very good reason why this is important is because in most cases where there has been action taken to stop projects through occupation and/or demonstration, it has been the traditional faction that has been the flashpoint. This is true of the most noteworthy actions undertaken in recent times including Oka, Ipperwash, and Caledonia. Limiting the dialogue to recognized band councils may address a narrow reading of the requirements to consult but it is unlikely to safeguard your interests or those of your clients from potential disruptions brought about by militant resistance. Band Councils for the most part have neither the time, nor the inclination, nor the resources to launch these sorts of actions. They are busy with the day-to-day business of managing a community.

But what is the source of the apparent rise in the militancy of the First Nations? The suggestion by some that it would be more appropriate if they followed legitimate and approved channels and methods to seek redress for their grievances before resorting to disruptive and illegal forms of protests belies a misunderstanding of the situation in

[5] Gros Louis, Michel. *"RE: Final Draft: Standards and Guidelines for Consulting Archaeologists."* Letter on File with the Ontario Ministry of Culture. September 21, 2006, pp. 1-3.

which they have found themselves. For example, with respect to the Haldimand Tract in which the lands occupied in Caledonia are situated, this land was given to the Six Nations in recognition of their longstanding alliance and military aid to the Crown. The fact of the matter is that they have attempted to deal with the dispute over this land through government channels and the courts, and even resorting to direct petitions to the sovereign head of state at various times over the past 200 years. Sadly, this story is not unique. Peter Jones, an Ojibwa who became perhaps the most prominent Methodist missionary in North America of the 19th century, was heavily engaged throughout his adult life in filing petitions, meeting with government officials, and arranging audiences with the various lieutenants governor of Ontario and Queen Victoria herself in an effort to seek redress for the wrongs committed against a number of Ojibwa communities. Those who are interested in developing an understanding of the history and struggles of the Chippewa, Mississauga and Ojibwa communities of southern Ontario would be well advised to read Donald Smith's classic work, Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) & the Mississauga Indians. [6] For many First Nations people, all of these failed efforts have naturally led to the perfectly reasonable conclusion that the government and the courts will never deliver justice to them. These injustices are not limited to colonial history or the early history of the Dominion of Canada.

According to Dale Turner, a member of the Temagami First Nation in northern Ontario and an Associate Professor of Government and Native Studies at Dartmouth College, government policy regarding First Nations issues has failed and will continue to fail so long as four key issues remain unresolved for the indigenous populations of Canada:

1. *"They do not adequately address the legacy of colonialism.*
2. *They do not respect the sui generis nature of indigenous rights as a class of political rights that flow out of indigenous nationhood and that are not bestowed by the Canadian state.*
3. *They do not question the legitimacy of the Canadian state's unilateral claim of sovereignty over Aboriginal lands and peoples.*
4. *Most importantly, they do not recognize that a meaningful theory of Aboriginal rights in Canada is impossible without Aboriginal participation."*

Dale Turner[7]

As Turner himself points out, these are the critical issues from the First Nations perspective. It is not necessary that we agree but, until these issues are acknowledged and a meaningful dialogue is opened to address them, we will continue to construct conflict through the processes we employ and the policies we implement.

Most Canadians would be surprised to discover that the land on which the reserves are situated is managed in trust by Indian and Northern Affairs. Under this arrangement, the federal government has sold or leased mineral rights, timber rights, and fishing rights to

[6] Smith, Donald B. Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) & the Mississauga Indians. Toronto: University of Toronto Press, 1987.
[7] Turner, Dale. This is Not a Peace Pipe: Toward a Critical Indigenous Philosophy. Toronto: University of Toronto Press, 2006, p. 7.

commercial interests. They have leased land to homebuilders and cottagers and granted the right to collect municipal taxes to adjacent municipalities, not the reserve communities. And so, while the government may have long ago curtailed the outright seizure of First Nations land, the end result is the same; the land base is perpetually shrinking and what is left is devoid of resources which could be used to either sustain the population or which could be used for reserve based commercial undertakings. In addition, Indian Affairs has required that any proposed business ventures originating within these communities receive approval from Indian Affairs. Indian Affairs then dictates the details of how such enterprises should be administered, even going so far as to appoint the managers and employees. Most such ventures fail. All of the above obviously feed into a cycle of poverty, depression and the much chronicled attitudes of hopeless despair. This in turn feeds the popular fiction that Native people are lazy which serves to minimize their employability outside of the reserves.

These are just a few reasons why the Indian Act has been deservedly criticized by the international community as narrowly racist and genocidal in its intent. It has been around since the late 19th century with one major revision in the 1950s. However, this particular statute has not been without its fans. When the apartheid regime in South Africa sought to put a friendlier face on its oppression of the black population of that country, they borrowed bureaucrats from Indian and Northern Affairs. It would be inadvisable to employ the Indian Act as the basis for any legal position you might take or to use it in support of your position. It is unlikely to gain you any friends or win you any support.

The Saugeen Indians: Indian Act Mismanagement

The people known collectively as the Saugeen Indians form two bands on reserves within the Bruce Peninsula: the Saugeen Band and the Cape Croker Band. When their territory was first established they held roughly two million acres of land. By 1977 these people held less than 32,000 acres. These people are part of the larger culture of the Ojibwa tribe. In the Ojibwa tongue "Saugeen" means at the mouth of the river. The name is derived from their longstanding occupation of the Saugeen River watershed which had included all of Bruce County, most of Grey County, and the northern parts of Huron and Wellington Counties.[8]

Even before the Confederation of Canada or the Indian Act was written, management of Indian lands and peoples was a function of government. The Indian Department sold their lands and managed the resulting funds in trust to cover the costs of maintaining First Nations communities. By the middle of the 19th century the Indian Department had sold half a million acres for the benefit of the Saugeen Indians. They had also rented out their fisheries to commercial interests. Minimally, even based on the low sale prices used by the Indian Department, this would have amounted to at least five million dollars at that time. In theory all of this money was to be used for the benefit of the people of the community.[9] The largest amount of money ever held in the accounts for these people

[8] Schmalz, Peter S. The History of the Saugeen Indians. Ontario Historical Society Publication No. 5. Ottawa: Love Printing Service Limited, 1977, p. i.
[9] Schmalz, p. 149.

was $707,981.00 in the year 1900. This was after nearly all of their land was sold. Although another 20,000 acres was sold by 1920 the amount of money held by the government for these people actually decreased by $68,036.00. The Canadian government has no explanation for these figures.[10]

One might assume embezzlement is the most obvious explanation to cover the discrepancy between calculated amounts that should have been in these trust accounts and the amounts actually entered. There are other reasons. All costs associated with the sale or transfer of land was borne by the Band accounts. These costs included surveys and valuations. Surveys and valuations were often ordered by the Indian Department repeatedly for the same parcel of land and each repeated cost was charged to the Band. The Band had no say over these charges although they certainly objected to paying for the same thing over and over again.[11] The Indian Department also maintained two accounts to cover the expenses of the bureaucracy: The Indian Land Management Fund and The General Management Fund. These two funds each took 10% percent of the proceeds from the sale of lands.[12]

When lands were sold by the Indian Department to settlers only one fifth of the cost was required to be paid at the time of sale. The remainder was to be paid in equal installments over four years with an annual interest rate of 6 %. In addition, settlers were charged timber rights for timber cut and sold from these lands. Beginning in 1868, the newly formed Canadian government began to reduce the amounts due to be paid through a series of revaluations of the land which resulted in land value reductions in the settlers' favour. Timbering fees were also significantly reduced. Beginning in 1886, when settlers failed to pay taxes on their lands, it was Bruce County that recovered the land, resold it, and collected the money from the sale.[13]

While the Saugeen were being dispossessed of both their lands and the revenues to which they were entitled from them, the Indian Department was actively engaged in suppressing initiatives undertaken by the people to support themselves through farming, lumbering and fishing.[14] As employment opportunities within the Reserve community decreased, welfare increased. Until 1960 when the General Welfare Assistance Act came into effect, this assistance to community members was paid out of Band funds.[15]

In the 1960s public concern over the living conditions on reserves forced the Department of Indian and Northern Affairs to address the critical housing issue. The acute housing issues of the community could not be addressed through the Band's general fund. The solution was for the government of Canada to provide loans to individuals to pay for improved housing that would at least reach a minimum standard of living. Even by 1977

[10] Schmalz, p. 150.
[11] Schmalz, p. 151.
[12] Schmalz, p. 152.
[13] Schmalz, pp. 153-156
[14] See Schmalz, pp. 171-190.
[15] Schmalz, pp. 210-212.

Schmalz noted that it was still impossible for most of the people to pay off these substantial loans.[16]

After the Second World War the Department of Indian and Northern Affairs began to lease lots on reserve lands for ten year terms. The average rate for these leases was $30.00 per year. After the term expired offers to renew typically made no provisions for an increase in the lease rates, or the increase was negligible. By 1970 there were roughly 2800 cottagers leasing Saugeen lands. The Municipal Act of 1937 allowed townships to tax non-Indian residents of reserve lands to the full assessed value of the property. There was no provision for the Bands to receive any portion of the taxes levied against properties on lands the Bands owned. This issue was not corrected until the 1970s.[17]

The foregoing outline of some recent historical trends with respect to the Saugeen and Cape Croker Reserves, is only a partial summary of a few issues that have confronted First Nations peoples resident on reserve lands in the twentieth century. These issues and others have not been forgotten. History is not merely facts about the past, it is also the background context from which we frame concepts about ourselves and how we perceive others. These perceptions and attitudes constructed in the past will enter into any consultation process: It cannot be otherwise.

Guiding Principles

Apart from the purely practical consideration of avoiding property occupation, demonstrations and potentially damaging press coverage, it is only appropriate that any interested descent groups and individuals have an opportunity to raise concerns with respect to their heritage. There is no copyright on the inheritance of language, tradition, custom and beliefs from the past. No Band Council, Traditional Confederacy or individuals have an exclusive claim to the past. It is the common inheritance of all descendants and none should be excluded from voicing their concerns and their ideas.

Although the requirement to consult, when applicable, states that the interest of First Nations is to be defined by them, it is nevertheless a peculiar thing to observe that there seems to be a concerted effort on the part of many persons and agencies to define who has an interest and even who is to be recognized as a First Nations person with a right to express their interest. I say this is peculiar because, in my experience with other stakeholder consultations, this mania for precision in defining eligibility to speak and limitation of the scope of consultation does not generally occur. There seems to be a desire to minimize the number of people or groups involved when it comes to First Nations consultation. This pattern of behavior, I believe, only serves to underscore the distinction between consultation and negotiation. If we are truly interested in achieving through consultation a solution that best addresses the needs of all, then it seems obvious to me that consultation should be as broad as possible and that nobody with a declared interest ought to be excluded.

[16] Schmalz, pp. 214-215.
[17] Schmalz, pp. 218-225.

In recent years we have seen a rise in the militancy of many First Nations communities who are frustrated in their efforts to have their concerns taken into account when decisions are made respecting how we make use of the environment. Often the flashpoint for occupation and demonstration has been directly related to the desire to preserve heritage features of the landscape. Oka and Ipperwash were both the result of a dispute over the future disposition of burial grounds. In Caledonia, the connection to archaeology and cemeteries is not apparent on the surface but the questions which gave rise to the protest were longstanding historical issues that had not been addressed for two hundred years. I think most of us can agree that it makes sense that Aboriginal peoples should wish to preserve, protect and to document their rich cultural heritage in this province.

Archaeological research that deals with Aboriginal occupation and land use must have imbedded within it an ongoing dialogue between Aboriginal peoples and those who conduct this research. The aim here is the democratization of the process of archaeological investigation. Aboriginal involvement will necessarily impact all aspects of archaeological research including background research, survey methods, test excavations, site mitigation through excavation and/or avoidance, artifact analysis, interpretation of results, and determinations of significance. The object of this process is not to exclude the input of any Aboriginal peoples or of any researchers but, to derive mutually beneficial feedback that will ultimately inform the aims and methodologies employed in any undertaking to bring maximum benefit to practitioners, aboriginal populations, and the general public.

This then leads to the question: How do we develop the most reliable and democratic ways of knowing, both to bridge the gap between the archaeological community and Ontario's Aboriginal peoples, and to ensure that those who conduct this research do so in a manner that results in the greatest benefit and the least harm. This means that we need to establish a meticulous, systematic, transparent and sensitive means of documenting the archaeological resources of Ontario that does not merely satisfy the experts' needs, but also undertakes the much more generous task of making the discipline of archaeology one that is informed by and which informs, the descendant populations of the societies it seeks to study.

In order for us to develop a meaningful set of best practices, we must ensure that we are engaged in an informed discussion. This will impose obligations upon the archaeological and Aboriginal communities to enter into a process of mutual education to ensure that the perspectives of both are understood and a foundation is established to explore opportunities to enhance Ontario archaeology in a collaborative effort.

Propositions

1) The development of best practices will be an ongoing process. What is best by today's understanding may reasonably be expected to be revised as both the archaeological and Aboriginal communities each develop a fuller understanding of the perspectives of the other. It is proposed that as any new

standard is proposed, that it be discussed by a joint committee composed of members of the archaeological and Aboriginal communities. Any proposition endorsed by this committee would then be forwarded to the APA (Association of Professional Archaeologists) and the Aboriginal government(s) affected to be ratified. Each would then be responsible to notify its membership of the adopted standard. A proposed new standard or a revision to any existing standard can be submitted for consideration by anyone.

2) It will be necessary to have educational workshops for archaeological researchers where Aboriginal perspectives, concerns and knowledge can be taught to archaeologists to broaden their understanding and sensitivity to issues of importance that ought to be incorporated into their work.
3) It will be necessary to have educational workshops for interested members of the Aboriginal community to learn about the methods archaeologists employ and the reasons behind them.
4) The archaeological community needs to establish a co-op or employment program to ensure that Aboriginal peoples are participants in the conduct of archaeological research. As part of their employment, these individuals would also act as a liaison with Aboriginal communities.
5) As an initial starting point, the proposed new Standards and Guidelines should be used as the default best practices for archaeological methods (minus Section 6). The reason for this is that the archaeological community has not yet had the opportunity to evaluate their efficacy through practice and to formulate an experience-based critique. As well, the use of these already developed standards will establish a common baseline for education and dialogue with Aboriginal communities. As familiarity with these practices grows, Aboriginal communities will be able to determine areas of needed improvement.
6) Aboriginal communities must each identify geographic areas and/or periods and/or archaeological cultures of interest to them with respect to archaeological resources. Once these are identified, archaeologists should submit duplicate Project Information Forms to the affected communities. These communities would then be able to contact the consultants directly to discuss the project parameters and to make a determination of how and when they may wish to be involved.

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